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April 11, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

DOCKET FILE COPY ORIGINAL

Mr. William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

Re: Telefónica Larga Distancia de Puerto Rico, Inc.'s Comments
IB Docket No. 95-22; RM-8355; RM-8392

Dear Mr. Caton:

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD"), by its attorneys, hereby submits for filing an original and five copies of their Comments in connection with the above-captioned matter.

Also enclosed is an additional copy of TLD's Comments which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Alfred M. Mamlet

Alfred M. Mamlet
Counsel for Telefónica Larga Distancia
de Puerto Rico, Inc.

/srh-m
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	IB Docket No. 95-22
	)	RM-8355
Market Entry and Regulation of Foreign-Affiliated Entities	)	RM-8392

COMMENTS OF TLD

TELEFÓNICA LARGA DISTANCIA
DE PUERTO RICO, INC.

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Its Attorneys

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SUMMARY

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD") opposes AT&T's proposed protectionist standard for market entry under Section 214 because it favors AT&T and hurts just about everyone else. AT&T's competitors would be hindered in their efforts to attract foreign capital to build the Global Information Infrastructure ("GII") in competition with AT&T. In turn, American consumers would face higher prices once AT&T had less competition. And AT&T would be left free to continue its domination of international telecommunications through direct investments in carriers in other countries and its global alliance, WorldPartners™.

The Commission does not have jurisdiction to deny Section 214 applications on the basis of international trade considerations. It has long been understood that only the Executive Branch has the authority to speak for the United States in matters of foreign policy. This principle is enshrined in the Constitution's separation of powers. In telecommunications and other international trade matters, the power to threaten our trading partners with reciprocal treatment has been specifically granted to the Executive Branch -- rather than the Commission -- by not one but two Congressional enactments. Even the Commission's own past practice was founded on an assumption that the Commission lacked authority to venture into the realm of telecommunications trade policy.

There is a reason for this unanimity. In the long run, intentionally or unintentionally, Commission rules designed to influence the behavior of foreign governments will interfere with the ability of Executive Branch negotiators to speak clearly and with one voice on behalf of U.S. interests. Indeed, that prospect is real. The United States is already negotiating for global telecommunications liberalization.

As part of those negotiations, the United States agreed not to take any action that would improve its leverage in the negotiations until the conclusion of negotiations in April 1996. The proposed rule is inconsistent on its face with this "standstill" agreement (Part II).

From the perspective of international trade policy, the proposed rule is doomed to failure. While there are powerful forces moving countries throughout the world toward liberalization, the reciprocity principle is not one of them. Imagine what the response would be if Chile told the RBOCs that their provision of international facilities-based services in that country was contingent on the U.S. adoption of Chile's blueprint for promoting U.S. local telephone competition. Chile might justify its plan on the grounds that Chilean-owned AmericaTel needs cost-based local access fees in the United States, and that the RBOCs can subsidize its competitive offerings in Chile with its local service in the United States. Of course, Chile's plan would be viewed in the United States as a "non-starter." AT&T's proposal is not likely to get a warmer response abroad.

At bottom, the proposed rule would not prevent foreign-affiliated carriers from entering the U.S. market. Rather, the rule might require them to offer international services on a resale basis, which would impose a significant cost penalty, but not foreclose entry. While this cost penalty would harm competition in the United States, it is unlikely to provide a meaningful incentive for foreign carriers and governments to make structural changes in their telecommunications markets before they are otherwise prepared to make them. Indeed, the proposed rule would lead to a stalemate or worse once other countries copied the U.S. rule. American carriers investing abroad would be among the first casualties of the proposed rule (Part III).

From the perspective of U.S. telecommunications policy, AT&T's proposal (1) is not necessary to protect against potential competitive abuses; (2) is actually harmful to competition in the United States; and (3) discriminates in favor of AT&T. The proposed rule is unnecessary because the Commission's current open-entry standard imposes sufficient competitive safeguards to ensure that foreign-affiliated carriers cannot discriminate against U.S. competitors. AT&T has been unable to point to any competitive abuses from the entry of foreign-affiliated carriers into the U.S. market that are not adequately covered by the Commission's existing competitive safeguards. Indeed, empirical evidence establishes that AT&T has not been damaged by foreign carrier entry (Part IV).

However, the AT&T proposal would be worse than regulatory overkill because it would harm competition in the U.S. market. The second, third, fourth and fifth largest carriers in the United States are already using (or seeking) foreign capital to compete against AT&T. In order to permit these carriers -- and even smaller ones -- to provide viable competition to AT&T, the AT&T proposal should be abandoned (Part V).

Not surprisingly, AT&T's proposal would discriminate in favor of AT&T. The proposed rule would ignore AT&T's direct investments in foreign carriers in Canada, the Ukraine and Venezuela; as well as AT&T's global alliance that includes major markets such as Australia, Canada, Japan, Hong Kong, Netherlands, Singapore, South Korea, Sweden and Switzerland. AT&T sent 2.2 billion minutes of traffic to these countries in 1993, which was more than 1475 times as much traffic as TLD sent to its "affiliated countries." If the goals of the proposed rule are to prevent competitive abuses and open up foreign markets, then the AT&T exception swallows the rule (Part VI).

The Commission should confirm that any new rule only covers new entrants. It should not apply to carriers the Commission has previously authorized to provide international facilities-based services. If TLD is not permitted to continue to provide international facilities-based services it will not be able to continue serving as an effective competitive restraint on AT&T. Telefónica Internacional ("TI") invested $112 million in TLD with the expectation that it would be able to modernize and expand its international facilities. The Commission should not change the rules for TLD after this investment has been made (Part VII).

If the Commission adopts a new rule, then it should modify the current proposal in several ways (Part VIII):

- The Commission should apply any new rule only on "affiliated routes." The only possibility of competitive abuse is on routes where the foreign carrier has a presence on both ends. There is no justification for applying the proposed rule to unaffiliated routes.

- The Commission should not review all of a foreign carrier's primary market, but rather concentrate on the foreign carrier's home market. The proposal to examine all "primary markets" could hurt efforts by developing countries to privatize and modernize their telecommunications infrastructure. For example, the proposed rule would penalize TI for investing $1.8 billion in Peru, and for committing to upgrade that country's telephone system.

- The proposed rule should allow time for planned transitions to competitive environments. Competition did not come to the United States overnight. Even today, there continue to be protracted and heated legislative and regulatory debates over issues covered by the Commission's proposed test such as foreign ownership, interconnections, cost-based rates, provision of technical information, and protection of carrier and customer data. Any rule should recognize that other countries will need time to liberalize their markets too.

* * * * *

While basing Section 310(b) public interest waivers on reciprocity might arguably be a step toward liberalization, the proposed new entry standard under

Section 214 would be an unfortunate retreat to protectionism. The U.S. efforts to assume a world leadership position on GII issues would be completely undermined if the proposed rule were adopted by the Commission:

- **Privatization, Universal Service** and **Open Access** would be harmed because a foreign investor that commits to investing in a developing country's telephone system would be penalized when investing in the United States. The Vice President's ITU address in Buenos Aires praised the privatizations in Argentina, Chile and Venezuela, where TI's substantial infrastructure investments have expanded universal service dramatically and have increased opportunities for open access considerably. However, the new rule would penalize TLD in the United States because TI made these direct investments in developing countries.

- **Competition** would be diminished by the U.S. example of abandoning an open entry policy in favor of a test that closes the doors on virtually all foreign carriers. At home, carriers would be hindered from obtaining needed foreign capital to compete against AT&T. Abroad, other countries copying the U.S. rule would exclude U.S. companies from making investments.

- **Flexible Regulation** could also suffer under the proposed rule. Vice President Gore's Buenos Aires address stressed that: "[i]n order for the private sector to invest and for initiatives opening a market to competition to be successful, it is necessary to create a regulatory environment that fosters and protects competition and private sector investments, while at the same time protecting consumers' interests." Any new rule which is imposed on a foreign investor after being previously authorized to provide facilities-based services would violate the GII principle of a flexible regulatory system that "fosters and protects competition and private investments."

In short, the proposed rule would be viewed throughout the world as an anticompetitive, protectionist action that closes the U.S. market, and that contradicts the GII principles previously championed by the United States.

TABLE OF CONTENTS

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	)	**RM-8355**
Market Entry and Regulation of Foreign-Affiliated Entities	)	**RM-8392**

COMMENTS OF TLD

I. INTRODUCTION

The NPRM candidly declares that one of the three "basic goals" served by the proposed rule is "[t]o encourage foreign governments to open their communications markets." NPRM ¶ 26. Indeed, it appears that this is the Commission's paramount objective. There are two critical flaws with the Commission's effort to further this goal. **First**, the Commission does not have jurisdiction over such international trade matters. The Constitution, legislative scheme and Commission precedents all reject any FCC claim over international trade matters. The potential disruption the proposed rule could have on the General Agreement on Trade in Services negotiations underlines the reasons why the Commission should stay out of the international trade arena (Part II).

Second, the proposed rule has virtually no chance of persuading foreign countries to open their markets sooner than they otherwise would. Of course, many countries -- inspired by the U.S. example -- are already opening their telecommunications markets. However, there are internal obstacles in many countries -- as there still are in the United States -- that dwarf the influence of international trade considerations. In any event, the cost penalty the proposed rule would impose on foreign carriers providing international services in the United States, on a resale basis instead of a facilities basis, is not likely to convince many countries to liberalize any sooner. Further, the lack of uncertainty inherent in the proposed six-part test, and the other public interest factors the Commission would review even if a foreign carrier passes the six-part test, make it even more unlikely that foreign countries would liberalize faster in response to any new rule. While a new rule is unlikely to encourage foreign countries to liberalize any sooner, it would probably lead many countries to copy it, just as many countries have copied the U.S. foreign ownership provisions in Section 310. This would lead to a stalemate or worse as U.S. companies are deprived of opportunities to do business abroad (Part III).

The proposed rule certainly cannot be justified to protect U.S. carriers. The Commission has already determined that the competitive safeguards it imposes on foreign-affiliated carriers ("FACs") are sufficient to protect U.S. carriers. AT&T cannot point to any competitive abuses not covered by the Commission's current competitive safeguards. In fact, empirical evidence establishes that AT&T has not suffered from the entry of FACs (Part IV).

Indeed, the principal effect of the proposed rule would be to harm the U.S. public interest because it would seriously impair competition in the international telephone market. Leading U.S. carriers such as MCI and Sprint would be penalized for obtaining (or seeking) foreign capital. Smaller U.S. carriers would not be able to use foreign capital to compete against AT&T (Part V).

The only obvious beneficiary of the rule is AT&T, which would gain since the rule would harm its competitors at home and turn a blind eye to AT&T's activities abroad. Any new rule intended to prevent competitive abuses and open up foreign markets should cover AT&T (Part VI).

The Commission should confirm that any new rule would not be applied to FACs previously authorized by the Commission to provide international facilities-based services. Otherwise, competition in the U.S. market will decrease as existing facilities-based carriers are prevented from keeping up with AT&T (Part VII). Finally, if the Commission adopts any rule despite all of these legal and economic difficulties, the Commission should make a number of modifications in the public interest (Part VIII).

BACKGROUND

In December 1992, the Commission approved the acquisition of 79% of TLD by Telefónica Internacional ("TI").[1/] TLD is now owned by: (1) TI, which has retained a 79% interest;[2/] (2) the Puerto Rico Telephone Authority ("PRTA"), a Puerto Rico governmental agency that owns 19%; and (3) the TLD employees, who own 2% through an employee stock ownership plan.[3/]

In the TLD Acquisition Order, the Commission approved the transfer of Section 214 authority and cable landing licenses to allow TLD to provide direct

1/ Telefónica Larga Distancia de Puerto Rico, Inc., 8 FCC Rcd 106 (1992) ("TLD Acquisition Order").

2/ For purposes of simplicity, descriptions of TI's holdings will exclude mention of wholly-owned subsidiaries which in turn hold TI's ownership in operating companies.

3/ Telefónica de España ("TE") owns 76.22% of TI, and the remainder is held by the Spanish government. TE is a private corporation, with 68% of the stock held by private investors (including Americans who purchase the 17% of TE traded on the New York Stock Exchange). The remaining 32% of TE is owned by the Spanish government. The Spanish Economy Minister, Pedro Solbes, recently announced that "'Telefónica should be privatised in 1998, when the telecommunications monopoly disappears." *Telefónica to be Privatised by 1998 - Solbes*, Reuters News Service Mar. 27, 1995.

international facilities services. The Commission authorized TLD to provide facilities-based services to affiliated countries, including Spain, Argentina, and Chile.[4/]

In addition, the Commission placed a number of competitive safeguards on TLD's operations to ensure that it did not obtain an unfair advantage over other U.S. carriers based on its foreign affiliations. TLD was also initially designated a dominant carrier on all international routes since the International Services Order[5/] was not yet in effect. However, TLD applied, more than two years ago, to be reclassified as a non-dominant carrier on non-affiliated international routes pursuant to the International Services Order. Those applications are still pending.

TI also holds interests in several telecommunications carriers in other countries. In Chile, Argentina and Peru, TI has investments in carriers that provide local, domestic long distance and international telephone services. In Venezuela, TI owns a 6.4% interest in CANTV, which provides local, domestic long distance and international services. AT&T holds a similar minority investment in CANTV, while GTE has a much larger interest. Finally, TI owns interests in paging or cellular companies in Portugal, Romania and Colombia.

4/ TLD Acquisition Order, 8 FCC Rcd at 117-18.

5/ Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992) ("International Services Order").

II. THE COMMISSION DOES NOT HAVE JURISDICTION OVER INTERNATIONAL TRADE ISSUES

In an effort to modify the telecommunications policies of other governments, the Commission proposes a policy of telecommunications trade reciprocity, a policy it claims is grounded in Sections 151 and 214 of the Communications Act. Section 151 gives the FCC the authority to regulate international communications, and Section 214 requires that this authority be exercised only to pursue the goal of "public convenience and necessity."[6/] Broad as this language may be, it cannot be read as authorizing measures designed to influence the telecommunications policies of foreign governments. Such a reading would run counter to the Constitution, to the statute, and to the consistent practice of both the Executive Branch and the Commission itself.

A. The FCC Cannot Interfere With The Constitutional Functions Of The Executive

The Commission is not a part of the Executive Branch. It is an independent agency. And independent agencies, whose defining characteristic is freedom from Executive branch control,[7/] cannot assume to themselves the constitutional functions of the Executive. That would violate the constitutional principle of separation of powers, a principle which prevents one branch of government from usurping the constitutional functions of another.[8/]

6/ 47 U.S.C. §§ 151, 214 (1988).

7/ See Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935) (upholding limitations on the Executive's removal power over independent agency commissioners); Wiener v. United States, 357 U.S. 349, 356 (1958) (upholding limitations on the Executive's removal power over independent agency commissioners).

8/ See Myers v. United States, 272 U.S. 52, 61 (1926); INS v. Chadha, 462 U.S. 919, 958 (1983); Bowsher v. Synar, 478 U.S. 714, 726-727 (1986); Morrison v. Olson, 487 U.S. 654 (1988).

Of the powers delegated to the Executive Branch in our scheme of government, few are more vital or more sweeping than the President's authority to conduct foreign affairs. This authority includes the power to communicate and negotiate with foreign states, to define the content of U.S. foreign policy, even to wage war. This authority is also exclusive: neither Congress nor the FCC may impair the Executive's ability to carry out this authority; nor may they assume such authority for themselves.

1. The President Has Exclusive Power To Negotiate International Agreements

The President's plenary authority over foreign relations derives both from the text of the United States Constitution and from the unitary nature of the Executive Branch.[9/] It is only constrained in two regards: (1) treaties must be concluded with the advice and consent of the Senate; and (2) the President cannot contravene the Constitution or U.S. law. One of the most significant of the Executive's foreign affairs powers is the power to communicate and negotiate with foreign states. Concentrating this power exclusively in the Executive was a key goal of the Founding Fathers, whose experience under the Articles of Confederation demonstrated to them the many problems that resulted from a collective, uncoordinated foreign policy.[10/] As Thomas Jefferson observed in 1790:

> The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department,

9/ U.S. CONST. art. II, §§ 1-3; Haig v. Agee, 453 U.S. 280, 291-92 (1981); Baker v. Carr, 369 U.S. 186, 212, 213 (1962); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

10/ See, e.g., 5 Debates on the Adoption of the Federal Constitution as Reported by James Madison 202 (J. Elliot ed. 1845) (discussing the problems of negotiating a peace settlement after the war of independence).

> except as to such portions of it as are specially submitted to the Senate.[11/]

The President's plenary authority to speak on behalf of the United States has also been recognized by the Supreme Court:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.[12/]

The Supreme Court has repeatedly reaffirmed this exclusive Presidential prerogative to speak for the nation, ever-cognizant of both the Constitutional principle at issue and the consequences of compromising it.[13/]

The proposed rule poses exactly the danger that a unified Executive was designed to avoid. The proposed rule essentially dictates to foreign governments the regulations and regulatory structure they must have in order for their telecommunications firms to gain access to the U.S. market. As such, it is an impermissible effort to implement the Commission's own international trade policy through either open or disguised trade negotiations. Intentionally or unintentionally, a Commission with its own telecommunications trade policy is likely to contradict or undermine specific efforts on the part of the Executive Branch to negotiate both bilateral and multilateral telecommunications trade agreements.

2. The FCC Cannot Assume To Itself A Power That Congress Cannot Constitutionally Delegate

Nor can the Commission take comfort from Congress' broad grant to the Commission of authority to regulate in the public interest. For Congress itself is limited

11/ Opinion on the Powers of the Senate Respecting Diplomatic Appointments, Apr. 24, 1790, reprinted in 16 Papers of Thomas Jefferson 378, 379 (J. Boyd ed. 1961).

12/ Curtiss-Wright, 299 U.S. at 319.

13/ See United States v. Belmont, 301 U.S. 324, 331 (1937); United States v. Pink, 315 U.S. 203, 232 (1942); Dames & Moore v. Regan, 453 U.S. 654, 682-83 (1981).

by the doctrine of separation of powers. As the Court of Appeals for the District of Columbia has said: "The subtleties involved in maintaining amorphous relationships are often the very stuff of diplomacy -- a field in which the President, not Congress, has responsibility under our Constitution."[14] As the Senate Committee on Foreign Relations recognized early in our history:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine, when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.[15]

Thus, even if Congress intended to do so, it could not authorize the Commission to compete with the Executive in foreign affairs.

B. There Is No Statutory Basis For Exercising Jurisdiction

In the present context, however, it is clear that Congress had no such intent. Quite the contrary, Congress has created a comprehensive statutory framework to regulate international trade policymaking. And in this framework, Congress has delegated almost all responsibility for international trade issues, including those involving telecommunications, to the President and his United States Trade Representative ("USTR" or "Trade Representative"). Most notably, Congress has established a specific program for taking retaliatory action against certain foreign trade

[14] Goldwater v. Carter, 617 F. 2d 697, 708 (D.C. Cir.), vacated on other grounds, 444 U.S. 996 (1979).

[15] 8 Reports of the Committee on Foreign Relations 24 (1816).

practices under Section 301 of the Trade Act of 1974 ("Trade Act").[16] This program, which applies directly to trade in telecommunications products and services through the Telecommunications Trade Act of 1988 ("TTA"),[17] is the only legislative authority for retaliating against unfair foreign trade practices. The FCC's effort to condition access to the U.S. market on the degree of reciprocity offered by foreign countries runs directly counter to both the spirit and the substance of this statutory framework.

1. Section 301

Under Section 301, USTR is responsible for identifying and responding to the unfair trade practices of other countries. Specifically, USTR is required to investigate the trade practices of foreign countries to determine: (1) whether the rights of the United States under any trade agreement are being denied; (2) whether any act, policy or practice of a foreign country violates, is inconsistent with, or otherwise denies benefits to the United States under any such trade agreement; or (3) whether any such act, policy, or practice is unjustifiable and burdens or restricts United States commerce.[18] Once USTR decides that such impediments to U.S. commerce exist, the Trade Representative, subject to direction from the President and to certain other exceptions, is required to take specific retaliatory and/or ameliorative action.[19] Among

[16] 19 U.S.C.A. §§ 2411-20 (Supp. 1995).

[17] 19 U.S.C. §§ 3101-11 (1988).

[18] Trade Act § 2411(a)(1). An act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States. Trade Act § 2411(d)(4)(A).

[19] Trade Act § 2411(c). Such action is discretionary where the USTR finds that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce." Id. § 2411(b). "An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation

(continued ...)

the specific actions authorized are: (1) suspension of trade benefits; (2) imposition of import duties or other restrictions on goods and services; (3) negotiation of binding agreements which eliminate the practice or policy at issue; and (4) with respect to service sectors, restriction of the terms and conditions of any access authorization, license, permit or order.[20/]

Additionally, the program established by Section 301 fully considers the broad range of United States and international concerns involved in taking retaliatory trade action. For example, in conducting investigations and making determinations under Section 301, USTR and the President are granted a significant amount of discretion.[21/] Moreover, during an investigation, USTR is required to seek consultations with the country whose practices are at issue and, if a trade agreement is involved, to use any dispute resolution procedures provided for in such agreement.[22/] As these provisions demonstrate, Congress knew that retaliatory action against unfair trade practices is a controversial and risky undertaking that requires careful consideration of a broad range of issues -- issues that are clearly beyond the FCC's jurisdiction.

19/ (... continued)
of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." Id. § 2411(d)(3)(A). Such unreasonable acts, policies and practices include those which deny fair and equitable opportunities for the establishment of an enterprise or other market opportunities. Id. § 2411(d)(3)B).

20/ Id. §§ 2411(c)(1) & (2), 2411(d)(6).

21/ Id. § 2411(a) & (b).

22/ Id. § 2413(1) & (2). Further, in determining whether a particular act, policy or practice is unreasonable, USTR is specifically instructed to take into account a country's progress in eliminating the identified problems and its overall level of economic development. Id. § 2411(d)(3)(C)(i).

2. The Telecommunications Trade Act of 1988

If there were any doubt about Congress' intent with respect to telecommunications trade, it has been laid to rest by the Telecommunications Trade Act,[23/] which expressly gives USTR jurisdiction to retaliate against the unfair trade practices of foreign countries in the telecommunications sector. The TTA is similar to the Trade Act. It requires USTR to: (1) investigate trade barriers to U.S. telecommunications products and services and identify priority countries for purposes of negotiating telecommunications trade agreements; (2) negotiate such trade agreements; and (3) determine whether any act, policy, or practice of a foreign country is not in compliance with an agreement or otherwise denies, within the context of such agreement, mutually advantageous market opportunities to U.S. telecommunications products and services.[24/] Additionally, USTR must treat any determination made under these provisions as if it were made under Section 301.[25/]

The legislative history of the TTA indicates that Congress' overall objective was to open closed foreign markets rather than to close or inhibit competition in the American market, and that negotiation was the preferred method for doing so.[26/] Further, the Conference Report expressly states that the term "mutually advantageous market opportunities . . . is not intended to suggest that foreign telecommunications markets must be a mirror image of the U.S. market."[27/] The FCC's proposed rule runs counter to this Congressional intent in two ways. **First**, the FCC has neither the

23/ 19 U.S.C. §§ 3101-3111 (Supp. 1994).

24/ Id. §§ 3103, 3104, & 3106.

25/ Id. § 3106(c).

26/ See H.R. Rep. No. 471, 99th Cong., 2d Sess. pts., I & II, at 9 (1986).

27/ See H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1673, 1674.

authority nor the expertise to negotiate for open markets; this, as Congress recognized, is clearly an Executive Branch function. **Second**, the rule focuses on restricting access to the U.S. market for foreign competitors whose home markets do not closely mirror the U.S. market -- precisely what Congress did not want to do.

3. Other Congressional Action

The TTA is consistent with other Congressional action at the intersection of international trade issues and telecommunications policy. For example, in the Submarine Cable Landing Act ("CLA"),[28/] Congress explicitly stated that the President must issue a written license to land or operate a submarine cable connecting the United States with any foreign country and that the President may withhold or revoke such a license when he determines such action "will assist in securing rights for the landing or operation of cables in foreign countries. . . ."[29/] While the President, in an Executive Order, delegated the formal licensing authority to the FCC, the Executive Branch retains control because the FCC has no power to issue the license without prior State Department approval.[30/] These delegations of authority conditioned on Executive Branch approval make the FCC's lack of independent authority in the international trade area all the more evident.[31/]

28/ 47 U.S.C. §§ 34-38 (1988).

29/ Id. § 35.

30/ See Exec. Order No. 10530, 19 Fed. Reg. 2709 § 5(a) (1952), reprinted in 3 U.S.C. § 301 (1988); TLD Columbus II Cable Order, 9 FCC Rcd 4041, 4045 n.27 (1994).

31/ The only statutory authority for the Commission to consider trade issues is contained in Section 308(c) of the Communications Act which explicitly authorizes the FCC, in granting a radio station licenses for international service, to "impose any terms, conditions, or restrictions authorized to be imposed . . ." under the CLA. The

(continued ...)

Indeed, Congress has considered and consistently rejected proposals to confer on the Commission the authority the proposed rule lacks. As recently as 1993, Congressman Markey, then Chairman of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, introduced the Fair Trade in Services Act of 1993 ("FTSA").[32/] Section 202 of the FTSA would have "grant[ed] the FCC the authority to deny a Section 214 application if the Commission finds that the home market of the applicant does not provide comparable access to U.S. companies."[33/] The bill failed. There is no basis in law for the Commission to seize outright an authority that Congress has chosen not to confer.

4. The Public Interest Standard

Nor can the authority be derived indirectly from the public interest standard. In other contexts, of course, the public interest standard allows the Commission to exercise broad discretion in granting or conditioning licenses. But broad language allowing regulation in the public interest cannot overcome the constitutional and statutory provisions conferring foreign policy supremacy on the Executive Branch. The Commission is not free to adopt measures affecting foreign trade policy simply because it can articulate a way in which its measures might improve conditions for U.S. telecommunications consumers. Such an approach would eviscerate Executive power. No doubt, Americans would enjoy better telecommunications service in and to China if that country were not a Marxist oligarchy. But the Commission may not refuse

31/ (... continued)
Commission has never used this authority to attempt to condition a license on grant of reciprocal access for U.S. carriers to a foreign market. In any event, it is clear that any Commission authority in this area must stem from an explicit statutory authorization.

32/ H.R. 3565, 103d Cong., 1st Sess. (1993).

33/ Telecommunications and Financial Services Fair Trade Act of 1993, 139 Cong. Rec. E2981 (daily ed. Nov. 20, 1993) (statement of Congressman Markey).

to approve telecommunications links to China until that country adopts a regime that recognizes First Amendment values. Just showing an arguable public interest is not enough to overcome the presumption favoring Executive control of such decisions.

The public interest standard is a particularly weak reed in the present context for two reasons. **First**, it is plain that the immediate impact of this rule would be to hurt U.S. consumers. See Part V, infra. Any benefit to the U.S. market from the proposed rule would be, at best, speculative and contingent on future events. Pursuit of such a contingent benefit cannot overcome the presumption of sole Executive control created by both constitutional doctrine and the comprehensive statutory scheme for trade retaliation.

A **second**, and fatal, weakness of the public interest standard as a justification for this proposed rule is the nature of the contingency that must come to pass before consumers receive some benefit from the rule. This proposed rule would serve the public interest only if it successfully influences the behavior of foreign governments. But influencing the behavior of foreign governments is the heart of the President's foreign affairs power. The fact that a Commission rule may affect foreign governments is a reason to restrict -- not expand -- the Commission's jurisdiction.

C. The FCC And The Executive Branch Have Previously Recognized That The FCC Lacks Jurisdiction Over International Trade Matters

Reflecting all these concerns, the past statements and practice of the FCC quite clearly disclaim all authority to regulate international trade matters. For example, in Foreign Ownership of CATV Systems, 77 F.C.C. 2d 73 (1980), the FCC refused to adopt any reciprocity conditions on foreign ownership of cable television systems because it lacked jurisdiction to do so:

> **We do not believe a desire for reciprocity in international investment policies by itself provides an**